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Supreme Court, U.S.
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No. 01-1600

In The
Supreme Court of the United States

JOHN UNGER, II, JOHN OVERINGTON, ELIZABETH BLAKE, GREGORY CORLISS, JERRY M. MAYS, KENNETH MAYS, BILL MOORE, SHIRLEY MOORE, CLARENCE PENNINGTON, WILLIAM C. RITCHIE and PHILLIP SPRIGGS,

Appellants,

v.

JOSEPH MANCHIN, III, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of West Virginia

REPLY TO APPELLEES' MOTION TO AFFIRM

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QUESTION PRESENTED

WHETHER THE REASONS SET FORTH BY WEST VIRGINIA ARE SUFFICIENT TO JUSTIFY DILUTION OF THE STATE SENATE VOTES OF OVER THREE-FOURTHS OF A MILLION WEST VIRGINIANS WHERE 1) WEST VIRGINIA VIOLATED ITS OWN CONSTITUTION BY DIVIDING ELEVEN COUNTIES; AND 2) THE ACTUAL MOTIVATION FOR THE VIOLATION OF THE EQUAL PROTECTION CLAUSE WAS A DESIRE TO TREAT ONE COUNTY DIFFERENTLY THAN THE OTHER 54.

Appellees have objected to the framing of the question presented by the appellants. It is nevertheless true that H.B. 511 "directly contravenes Article VI, §4 of the West Virginia Constitution." Amended Memorandum Opinion of the District Court, App. 5. Moreover, for each of the justifications cited as favoring the retention of Kanawha County's four senators, similar concerns were ignored elsewhere. The justifications violated the West Virginia Constitution and were inconsistently applied.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
A. The Two Panhandles and Cabell County Do Not Require that County Lines be Cut or that Kanawha County be Overrepresented	2
B. West Virginia Has Not Shown that Preserving the Cores of Prior Districts, or Minimizing Contests Between Incombents, Drove the *Prima Facie* Violation of Equal Protection Here	6
C. The Senate Plan Enacted in H.B. 511 Failed to Account for Ongoing, Severe Population Shifts and, in the Interest of Protecting Kanawha County's Residents, Violated the Equal Protection Rights of 779,000 West Virginians	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Karcher v. Daggett, 462 U.S. 725 (1983) 1, 7, 8

Mahan v. Howell, 410 U.S. 315 (1973) 5

Reynolds v. Sims, 377 U.S. 533 (1964) 1

Swann v. Adams, 385 U.S. 440 (1967) 1

STATE CASE

White v. Manchin, 173 W. Va. 526, 318 S.E. 2d 470 (1984) 10

STATE CONSTITUTIONAL PROVISION

West Virginia Constitution, Art. VI, § 4 7

STATE STATUTE

West Virginia Code § 1-2-1 4

ARGUMENT

Over 779,000 West Virginians (43%) live in seven senate districts which are more than 10% underrepresented. Appellees concede Appellants have stated a *prima facie* case. Thus, the burden shifted to Appellee.

Appellees claim that the 10.92% maximum deviation renders the burden on West Virginia relatively light. However, as this Court said in *Swann v. Adams,* 385 U.S. 440 (1967), "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State," *Id.,* at 445. Moreover, "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case," *Reynolds v. Sims,* 377 U.S. 533, 578 (1964).[1] It is improper to suggest that smaller deviations render the state's burden lighter. What is required is justification of the deviations from the ideal based upon the particular circumstances of the case.

In *Karcher v. Daggett,* 462 U.S. 725 (1983) a congressional redistricting case, the Court said, "the State must, however, show with some specificity that a particular objective *required* the specific deviations in its plan, rather than simply relying on general assertions," (emphasis added), 462 U.S. 715, at 721.

This is the heart of the problem with Appellees' position: there is no specific showing that the dictates of the West Virginia Constitution required Kanawha Countians to retain 10-plus percent more political power than 43% of the state's citizens. On its face, the term "required" means there are no alternatives which would work equally well to achieve the objectives *without* requiring a deviation that dilutes the votes of 43% of West Virginians. West Virginia has not and cannot make the required showing since there are readily available alternatives that do not require maximum deviations in excess of 10%. These will be discussed in the following section.

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[1] *See, also, Karcher v. Daggett,* 462 U.S. 725, at 741: The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

A. The Two Panhandles and Cabell County Do Not Require that County Lines be Cut or that Kanawha County be Overrepresented.

At certain points in the redistricting, state constitutional *requirements* such as "bounded by county lines," and the federal constitutional requirement of proportional representation, were both compromised so that lesser values such as protecting Kanawha County's four resident senators could be achieved.

The Appellees call this proof that this process is a balance of competing interests. However, first among the interests that a legislature must observe is its own constitution. An essential difficulty with West Virginia's position in this case is that it claims that the bounded by county lines requirement was only violated in order to achieve closer population equality. In two cases, Ohio and Upshur counties, West Virginia now admits this is not so. It is also not true in general.

Appellees cite the example of Jefferson and Berkeley Counties in the Eastern Panhandle, where a number of the Appellants reside, as proof that counties must be divided in order to equalize population. To see why that is not so, one need look no further than Kanawha County. In 1964 Kanawha County superimposed a second senate district within its borders. The same could have been done in the Eastern Panhandle in 2001. Had it been done, the combined 15th and 16th Districts could have looked like this:

Jefferson	42,190
Berkeley	75,905
Morgan	14,943
Mineral	27,078
Hampshire	20,203
Hardy	12,699
Grant	11,299
	204,317

Berkeley, Jefferson, Morgan, Hampshire and Hardy are in the top ten fastest growing counties in West Virginia. Most of these counties previously shared two senators under prior reapportionments. Most importantly, no division of any county is required to achieve two combined senate districts which are only about 4% below the ideal size. Impossible? Only if you see Kanawha County as entitled to a different sort of equal protection than the Eastern Panhandle.

Much is made by Appellees of the existence of two panhandles in West Virginia and the problems created by counties

which only border one other county. Having just shown how contiguousness, compactness, observance of county lines and equality of representation could all be improved in the Eastern Panhandle by superimposing one district upon another, we should note that, in the Northern Panhandle (District 1), the populations of Hancock, Brooke and Ohio Counties, if undivided, total as follows:

Brooke	25,447
Hancock	32,667
Ohio	47,427
	105,541

This is less than 1,000 from the ideal of 106,373! By dividing Ohio County the legislature moved District 1 *further* from the ideal. By using a superimposed district in the Eastern Panhandle and refusing to divide Ohio County, equality in both panhandles would have been achieved with *no* divided counties. Unique geography played no role here.

A whole new range of solutions is presented if a senate district is added, as the Legislature also did for Kanawha County in 1964. With 18 districts, the ideal size is (1,808,344 ÷ 18), or 100,463.5. This would permit Kanawha County to retain four senators at very close to ideal size (100,036.5 per district). What Appellees really sought (retention of four senators in Kanawha) could have been achieved painlessly. Meanwhile, the combined Eastern Panhandle districts could remain within the proper size by the removal of Grant County to another district.

Without dividing Ohio County, Senate District 1 would be only 5.05% above the ideal in the 18-district scenario. In addition, Cabell County, with its population of 96,784, would be only about 3.7% below the ideal. Thus, in the areas cited as problematic by the Appellees, there were simpler and better solutions at hand that were never tried[2].

Further solutions appear possible if a senate district is removed, and superimposed districts are used. These were never tried, either.

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[2] Had appellants been permitted discovery, the failure of the Appellees to even try these solutions would have been explored further. Without proof that changing the number of districts or superimposing one upon another was tried, West Virginia cannot prove it was impossible.

The Legislature declared it impossible to achieve equality without cutting county lines, then used this declaration as *carte blanche* to put split counties in 14 of the 17 senate districts, while saying it would be improper to split Kanawha. There were alternatives that could have achieved greater equality for a larger number of people and these alternatives were never tried, or even preliminarily mapped. There can be no doubt that by using superimposed districts and/or more districts, both equality and whole-county concerns can be served. West Virginia has not shown that it was required to dilute the votes of 779,000 West Virginians. It had the burden of proof.

Appellee claims it is impossible to avoid splitting counties. No discovery was permitted. On the contrary, there may be a combination of techniques which could achieve a perfect balance. We cannot say in this case, because the Legislature claimed it was impossible without trying or proving it, and the Appellants were denied the opportunity to explore what proof there was on the issue. Constitutionally required equality could have been achieved through the methods outlined above (increasing or decreasing the number of districts and/or superimposing districts).

In West Virginia Code § 1-2-1, the Legislature claims that it "[d]eviated from the long-established state policy [of creating districts bounded by county lines] *only* when necessary to ensure all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population."[3] (Emphasis added.) Now the Appellees concede that this is true in "all but two instances." Motion to Affirm, at 10. This is the quality of the justification proffered, and the question before the court is whether reasons this poor can ever rebut a *prima facie* case.

Finally, and most simply, the Legislature could have added Roane County to Kanawha's two superimposed districts, as outlined in Plan 28e5. Pet. App. 71. At page 11 of the Motion to

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[3] Appellees cite Ohio, Upshur and Wyoming Counties as having only "minimal intrusions into their borders." Motion to Affirm, at 10. It is true in the case of Ohio County, but in both Upshur and Wyoming (as well as Mercer) independent, non-contiguous chunks of the counties were removed. In both Upshur and Wyoming, the "minimal intrusion" comprises more than 10% of the county's population.

Affirm, Appellees discuss the reasons who this could not be done, none of which are required by the state constitution, or historical practice.

Appellees say that two of the districts' four senators would be required to come from Roane County, a result a "rational legislator" would wish to avoid. There is no explanation of why rational legislators would wish to avoid the requirements of the state constitution, except the claim that it would "be a case of the tail wagging the dog," and that "sparsely populated Roane County" has different interests from those confronting Kanawha County. These are objectives only applied to Kanawha County, and were apparently unavailable to other counties.

First, avoiding "tail wagging the dog" scenarios has never been given any weight by this Court, especially where the state constitution requires it. The second justification merits close scrutiny by this court. "Sparsely populated" Roane County is contrasted with (presumably urban) Kanawha. Charleston is a town of some 50,000 persons in a vast county of 200,000. Like Roane County and the rest of West Virginia, Kanawha County is sparsely populated. And what if it were not? Senator Robert Plymale of rural Wayne County has been wagging the Cabell County dog for years. *Mahan v. Howell*, 410 U.S. 315 (1973), requires proof of *consistent* application of the justifications cited by the state. In Cabell County, which contains Huntington,[4] the legislature cobbled on a tiny sliver of Wayne County to make a district of nearly ideal size. Monongalia County, with some 90,000 residents, is split into *three* fragments. So are Mercer and Wyoming. District 3 contains Parkersburg, one of the largest cities in West Virginia. Since Wood County, where Parkersburg is located, has some 88,000 residents, it was joined with Pleasants (pop. 7,514), Wirt (pop. 5,813, smallest in West Virginia) and a portion of Roane County (9,340 of 15,446 total residents) to make a district. Since Wood is in a multi-county district, it gets only one senator. The Pleasants County rural tail wagging the Wood County "urban" dog is Senator Donna Boley. The West Virginia Constitution requires nothing less.

Interestingly, the overpopulated District 3 contains more than half of the very same Roane County residents whose interests are so different from those of their neighbors in Kanawha. *see,* Pet. App. 51. Kanawha County cannot share a

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[4] West Virginia's second largest city, Huntington is approximately the same size as Charleston.

district with its next door neighbor, Roane, because their interests are too different. Somehow, in the same redistricting, Roane *can* be parcelled between districts[5] with which it has much less in common, and whose population centers are much further away from Roane than Charleston.

Roane Countians work in Kanawha County. Very few work in Parkersburg because it is too far away. If combining communities of interest is a great concern, West Virginia could have had that *and* closer equality at once. As with the bounded-by-county lines requirement, Appellees are arguing that the two values are in conflict when they are not.

Except in Kanawha County, there are a variety of methods West Virginia has used in dealing with the differing interests combined within a single district, some of which violate the state constitution. By far the most popular means chosen by West Virginia to deal with these divergent interests within a single district has been to ignore them, as was done in the Fifteenth District, which the lower court found to stretch over 200 miles from Pocahontas to Berkeley Counties, including mountainous timber counties with part of the Washington-Baltimore Metropolitan Statistical Area. We are told this was "unavoidable,"[6] yet the combined 15-16th Senate Districts outlined above avoid it quite neatly, with a contiguous, much more compact area that is closer to equality.

The justifications put forth are justifications for treating Kanawha County differently. They were not consistently applied across the state, and treating Kanawha County differently is not an appropriate objective in equal protection terms.

Since West Virginia has not proved that the maximum deviation was required by, or incident to, the consistent application of rational state policies, the District Court erred in granting summary judgment.

B. West Virginia Has Not Shown that Preserving the Cores of Prior Districts or Minimizing Contests Between Incumbents Battles Drove the *Prima Facie* Violation of Equal Protection Here.

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[5] These are not idle, nitpicking concerns. The 3rd and 4th Districts both have more than 10% maximum deviation from Kanawha. *See*, Pet. App. 52, right hand column. To move Roane County cures both under population (Districts 8 and 17) and overpopulation (Districts 3 and 4) in one stroke.

[6] Motion to Affirm, at 14.

In *Karcher v. Daggett,* 462 U.S. 725 (1983), this Court held that, "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent[s] . . . ". 462 U.S. 725, at 740. Appellees in the instant case cited these reasons and more, but the District Court held that the policies set forth in the legislation are "the most reliable source of legislative intent," Pet. App. 10, and refused to consider them. Thus, no court has ever found that these policies were consistently applied, and Appellees did not cross appeal the District Court's refusal to consider these extra reasons. That issue would not appear to be properly before this Court. Nevertheless, Appellants will address it here.

First, adding Roane County to Kanawha's two superimposed districts would not offend any legitimate interest in preserving the core of the prior districts or avoiding contests between incumbents. The *Karcher* court said:

> The State however, must show with some specificity that a particular objective required the specific deviations .... The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

462 U.S. 725, at 74 (1983).

Indeed, it must be noted that preserving prior districts and avoiding contests between incumbents would be perfectly guaranteed if the legislature refused to redistrict at all. These objectives are diametrically opposed to equal protection where a trend of shrinkage exists in one area along with growth in another[7]. In the first instance, the West Virginia Constitution requires that redistricting take place "after every [U.S.] census . . . " West Virginia Constitution, Art VI, § 4. Redistricting is required to alter the senate districts so as to make them "as nearly as practicable, equal in population . . . . " *Id.*

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[7] In other words, if your population shrinks dramatically while other parts of the state grow dramatically, you might lose a senator. This is the essence of proportional representation.

Thus, the driving purpose is to equalize population. Neither the state constitution not the legislation makes any mention of preserving prior districts or avoiding contests between incumbents.

As to the latter, incidentally, both the President of the West Virginia Senate and the Speaker of the House denied in their answer to the Complaint that the senate districts were drawn to protect incumbents. Only later was this canard raised by counsel. It was properly ignored by the District Court, and should be ignored here. It might in some instances be a legitimate policy, but it was not an objective sought by the West Virginia Legislature.

Plan 28e5 would do no violence to any legitimate objective. Moreover, through adding or subtracting senate districts, it may well be that the objectives would not suffer under other, even more equipopulous plans. The burden was on West Virginia to show "with some specificity that these objectives required the deviations in the plan . . . " *Karcher, supra.,* at 741.

West Virginia has made no such showing. The District Court erred.

C. The Senate Plan Enacted in H.B. 511 Failed to Account for Ongoing, Severe Population Shifts and, in the Interest of Protecting Kanawha County's Residents, Violated the Equal Protection Rights of 779,000 West Virginians

The District Court noted that:

> Kanawha's population decline has occurred at the same time that counties in West Virginia's 'Eastern Panhandle' and Putnam County, which borders Kanawha on the West, have experienced significant population growth, a trend which appears to be continuing.

Pet. App. 5.

The senate redistricting plan at issue here places the largest population in District 4, where Putnam County is located. The third and fourth most populous districts are 15 and 16, the "Eastern Panhandle." The least populous districts are 8 and 17, comprised of Kanawha County.

The trend is continuing, and every year the dilution of the voting power of Districts 4, 15 and 16 will likewise continue, spurred on by the continuing shrinkage of Kanawha and the

southern coalfields. A maximum deviation of 10.92% is the best this plan will ever produce. This plan systematically underpopulates the shrinkage areas and systematically overpopulates the growth areas. The result is continued movement *away* from equality over time.

Appellees say this was largely mitigated by underpopulation of some of the Eastern Panhandle House Districts. This assertion was argued in the District Court, and rebutted by a showing that over 20% of all West Virginians were under represented in both the House *and* the Senate. In any event, even in the Eastern Panhandle, such underpopulation will not stave off the inevitable inequality that will be caused by growth in the Eastern Panhandle combined with shrinkage in Kanawha and the coalfields. By the time of the 2000 Census, Senate District 6 had fewer than 90,000 residents and District 16 had over 130,000. Whether intentionally or not, the legislation is constructed to worsen inequality over time.

District 4 is the most overpopulated senate district. Most of its population is served in the House by delegate districts which are overpopulated as well. On the other hand, Kanawha County contains an underpopulated house district. The residents of that delegate district have by far the most political power in the state, while most of District 4 has the least power in the state. This is not a balance which satisfies equal protection.

It is by now clear that the driving force behind the senate redistricting was the protection of Kanawha County and the other shrinkage areas of West Virginia, at the expense of the rights of those in the growth areas. All of the justifications put forth by Appellees are consistently applied – in Kanawha County. That which was most consistently applied across the state – preservation of pre-existing districts – has not been shown to have required the specific deviations which occurred.

Most significantly, Appellees can cite no case where a state constitutional requirement, such as the bounded by county lines requirement, was so roundly ignored across the state then cited as a justification. Fourteen of the districts contain split counties; eleven of fifty-five (20 percent) of the counties were split. The clear evidence below was that closer equality *and* fewer county splits were available in not just one, but several of the plans before the Legislature. Indeed, counsel has read no case from this Court where the state even attempted to justify

equal protection violations by reference to a state constitutional provision it had itself violated.[8]

CONCLUSION

West Virginia has failed to show that the population deviations were required by, or incident to, the consistent application of legitimate state policies. At best, the justifications consisted of the general assertions of counsel. Appellants were wrongfully denied discovery to test the claims of the state, but in any event, those claims were not proved. If justifications this inadequate, applied this inconsistently, serve to rebut a *prima facie* case, then little remains of this Court's precedent in state redistricting cases. The Appellants respectfully request that this Court note probable jurisdiction.

Respectfully submitted,

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[8] Counsel of Record for Appellees is the author of the leading scholarly work on the West Virginia Constitution. At page 131 of *The West Virginia Constitution: A Reference Guide,* Greenwood Press, 1995, the author states: "The third criterion, that the districts be 'bounded by county lines,' prevents the legislature from parceling counties to create districts and requires instead that they include only whole counties. This provision works against gerrymandering as well, but it also helps to preserve a political voice in the legislature for the county units and to protect the interests of smaller counties. [Citation Omitted] Despite the clarity of the provision, however, recent reapportionments have rather brazenly ignored it. The 1991 redistricting, for example, had only seven of the seventeen districts bounded entirely by county lines, and the 1982 senate had but two of its districts in compliance with section 4. The legislature's rationale for its failure to adhere to this section was that deviation from the county boundaries requirement was necessary to meet federal one-person – one-vote standards. That rationale is dubious, however, in light of alternative plans that were before the legislature and in light of its ability to enlarge the number of districts. [Citation Omitted] The courts have not decided whether the legislature's deviations from the whole-county requirement have been constitutional." *Id.,* at 131. *See, also, White v. Manchin,* 173 W.Va. 526, 318 S.E. 2d 470 (1984), n.8.